NOTES

SECONDARY BOYCOTTS BY EMPLOYEES OF A COMMON CARRIER.—It requires no argument to show that it is anti-social, and therefore ought to be illegal, for men in concert, as alone, to threaten or actually to inflict economic injury upon another out of malice, personal ill-will, or for a corrupt motive.[1] Similarly, however laudable the object, concerted action cannot be effectuated by fraud, violence, or other tortious acts.[2] A boycott for an illegal purpose or a boycott for a legal purpose carried out by illegal means stifles inquiry at the threshold. It must be assumed, therefore, that the boycott, as here discussed, is a tactical move toward a lawful objective, such as economic betterment.[3]

A labor union may concertedly withdraw its labor or patronage from a particular employer; it may refuse to work with particular employees or materials.[4] Similarly a labor union may by peaceful persuasion induce anyone to boycott another.[5] But in most jurisdictions a union may not by threat of a strike or other economic pressure compel an employer, or any person against whom it has no grievance to boycott another against whom it has a grievance.[6] Some courts, however,

[1]Curran *v.* Galen *et al.* (1897) 152 N. Y. 33, 46 N. E. 297; *cf.* Tuttle *v.* Buck (1909) 107 Minn. 145, 119 N. W. 946; Quinn *v.* Leathem [1901] A. C. 495, 515.

[2]Michaels *v.* Hillman *et al.* (1920) 112 Misc. 395, 183 N. Y. Supp. 195; Herzog *et al. v.* Fitzgerald *et al.* (1902) 74 App. Div. 110, 77 N. Y. Supp. 366; see Stephens *v.* Ohio State Tel. Co. (D. C. 1917) 240 Fed. 759, 770; see Alaska S. S. Co. *v.* Internat. Longshoremens' Assn. (D. C. 1916) 236 Fed. 964.

[3]This is indeed the only justification recognized by the courts for the infliction of economic injury. National Protective Assn. *v.* Cumming (1902) 170 N. Y. 315, 63 N. E. 369.

[4]Iron Molders' Union *v.* Allis-Chalmers Co. (C. C. A. 1908) 166 Fed. 45; Pickett *v.* Walsh (1906) 192 Mass. 572, 78 N. E. 753; National Protective Assn. *v.* Cumming, *supra,* footnote 3; see Bossert *v.* Dhuy (1917) 221 N. Y. 342, 117 N. E. 582. *Contra,* Martin *v.* McFall (1903) 65 N. J. Eq. 91, 55 Atl. 465.

[5]Heitkamper *v.* Hoffman (1917) 99 Misc. 543, 164 N. Y. Supp. 533; Lindsay & Co. *v.* Montana F. of L. (1908) 37 Mont. 264, 96 Pac. 127; Grant Constr. Co. *v.* Bldg. Trades Council (1917) 136 Minn. 167, 161 N. W. 520.

[6]Burnham *v.* Dowd (1914) 217 Mass. 351, 104 N. E. 841 (but *cf.* Pickett *v.* Walsh, *supra,* footnote 4, declaring a primary boycott legal.) Purvis *v.* United Brotherhood (1906) 214 Pa. St. 348, 63 Atl. 585; Thomas *v.* Cincinnati, *etc.* Ry. (C. C. 1894) 62 Fed. 803, 821; Loewe *v.* Lawlor (1908) 208 U. S. 274, 28 Sup. Ct. 301. In Toledo, *etc.* Ry. *v.* Pennsylvania Co. (C. C. 1893) 54 Fed. 730, 738, Taft, C. J., said: "Ordinarily when such a combination of persons does not use violence . . . to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to compel them to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves and considered singly are innocent, when the acts are done with malice, i. e. with the intention to injure another without lawful excuse". Yet economic self-advancement is such lawful excuse, as this discussion shows, to negative the element of malice. It is the sensible view of the Bossert case that the boycott accordingly is lawful.

notably those of New York, sanction this secondary boycott.[7] Thus in *Bossert* v. *Dhuy*[8] the court refused to enjoin the carpenters and joiners' union from sending out circulars threatening with strikes all builders who used wood-work manufactured by non-union carpenters. In *Gill Engraving Company* v. *Doerr*[9] the federal court, interpreting New York law, refused to enjoin engravers from threatening strikes against employers using engraving from non-union shops. But in *Auburn Draying Company* v. *Wardell*,[10] a group of unions was enjoined from threatening strikes against dealers generally in any industry who dealt with the plaintiff,—in short, from declaring a general and universal boycott of the plaintiff.

The limitation thus set to the exercise of the secondary boycott was shadowed in the *Bossert* case: "The bounds beyond which an association of employees may not, as a general rule, go in controlling its members in their dealings with employers are not easily determined. They cannot at least extend beyond a point where its or their direct interests cease." In that case, as in the *Gill* case, the non-union product competed directly with the union product; the boycott was held legal because it was confined to the sphere where the interests of the unions were involved. But in the *Wardell* case the boycott reached out to unrelated industries, beyond the clash of union and non-union product. A localized conflict of competitors will be tolerated, but not its expansion so as to drag in the whole community.[11]

The New York rule, as a result, may be stated thus: A. may compel B. to boycott C. if the trade interests of all three are related. But suppose B. is a common carrier: may A. force B. to violate his obligation of serving C., a shipper? Three recent cases present different phases of the same industrial conflict. In *Reardon, Inc.* v. *Caton*[12] the defendant dock-laborers' union with the purpose of unionizing the trade, refused to unload trucks manned by the plaintiff's non-union employees, altho they accepted goods trucked by union men of the plaintiff. The union further threatened a steamship carrier with a strike if it handled the objectionable goods. The court held that the case fell within the limits set by the *Bossert* case, and denied the

[7]Parkinson Co. *v.* Bldg. Trades Council (1908) 154 Cal. 581, 98 Pac. 1027; Grant Constr. Co. *v.* Bldg. Trades Council, *supra*, footnote 5; *cf.* Cohn & Roth Co. *v.* Bricklayers', *etc.* Union (1917) 92 Conn. 161, 167, 101 Atl. 659.

[8](1917) 221 N. Y. 342, 117 N. E. 582.

[9](D. C. 1914) 214 Fed. 111, applying New York law.

[10](1919) 227 N. Y. 1, 124 N. Y. 97.

[11]"An employer having locked out his men will not be permitted though it would reduce their fighting strength, to coerce their landlords and grocers from cutting off shelter and food; and employees having struck will not be permitted, though it might subdue their late employer, to coerce dealers and users into starving his business." Baker, C. J., in Iron Molders' Union *v.* Allis-Chalmers Co., *supra*, footnote 4.

[12](1919) 189 App. Div. 501, 178 N. Y. Supp. 713. The plaintiff brought a separate action against the carrier for wrongfully "permitting" its employees to boycott him. The record did not sustain this allegation. Relief was denied because an injunction against the carrier would be nugatory if that against the employees were dissolved. Reardon, Inc. *v.* Internat. Mercantile Marine Co. *et. al.* (1919) 189 App. Div. 515, 178 N. Y. Supp. 722.

trucking company injunctive relief.[13] In *Burgess* v. *Stewart*[14] three affiliated dock-workers' unions, to force the closed shop upon the plaintiff shipper, refused to handle his product, and threatened strikes against ocean carriers who accepted the plaintiff's materials. The court found that the carriers and unions conspired together to boycott the plaintiff, and therefore violated the Federal Shipping Act, which forbids any ocean carrier from treating any shipper "unfairly", or discriminating against him "unjustly."[15]

Shortly thereafter precisely the same problem came before the federal court in *Buyer* v. *Guillan*.[16] In this case, however, the record showed that the carrier was willing to accept the plaintiff's goods but that its union employees refused to handle them. It was admitted that if the carrier had discharged his recusant employees, the whole line would have been tied up. The court refused an injunction. Judge A. N. Hand held that the shipper was not discriminated against "unreasonably" within the purview of the Shipping Act since the carrier was willing but unable to accommodate him; and further that the Shipping Act, in defining the obligations of the carrier, did not apply to its employees.[17]

The *Stewart* case can be distinguished fairly from the other two upon the finding of a conspiracy between the carrier and the unions.[18] Even if the Shipping Act does not apply to the employees, under this finding of fact they are liable as co-conspirators with the carriers, to

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[13]The decision in this case is noteworthy for a number of reasons. (1) Answering the contention that the union men were employees of a common carrier, the court says that casual dock laborers, hired by the hour, and having no steady employment, are not "in the same class with regular employees of those serving the public". (2) The court hints that the plaintiff presents a weak claim for equitable relief when he asks the court to protect him in his "right" to maintain working standards lower than the union scale (which 75% of the employers have voluntarily adopted) especially at the risk of creating an embargo on the shipping in the port of New York. (3) The court realizes that to enjoin the union men from boycotting the plaintiff means practically involuntary servitude, because although the dock laborers would be legally free to discontinue work, "they cannot quit work because of their necessities". Fawcett, J., in Burgess *v.* Stewart, *infra,* footnote 15, refuses to recognize this.

[14](1920) 112 Misc. 347, 184 N. Y. Supp. 199; Fawcett, J., sitting in the Supreme Court, King's County, Special Term for Motions.

[15](1916) 39 Stat. 733, §§ 14(4), 16(1), U. S. Comp. Stat. (1916) §§ 8146gg, 8146hh.

[16](D. C. 1920) 63 N. Y. L. J. 1625.

[17]Admitting that the acts of the defendants would have constituted a violation of the Sherman Anti-Trust Law, under the authority of Lawlor *v.* Loewe (1907) 280 U. S. 274, 28 Sup. Ct. 301, the court held that Section 20 of the Clayton Act (1914) 38 Stat. 730, §§ 6, 20, U. S. Comp. Stat. (1916) §§ 8835f, 1243d, legalizes the secondary boycott by labor unions. Duplex Printing Co. *v.* Deering (C. C. A. 1918) 252 Fed. 722; (1920) 20 Columbia Law Rev. 696. It is to be noted that the Clayton Act provides that no "injunction shall be issued". *Quaere,* whether that means that despite the Lawlor case, the plaintiff cannot sue for damages.

[18]A. N. Hand, J., said in Buyer *v.* Guillan, *supra,* footnote 16: "If I found here that the labor unions were refusing to handle the complainant's merchandise and had arranged with the Old Dominion Transportation Company to refuse to take the goods in order to aid their policy, the case might be different."

whom the Shipping Act admittedly applies.[19] The *Reardon* and *Guillan* cases, sanctioning as they apparently do the inducing of a breach of duty, are not supported by cases in the field of interstate commerce: a secondary boycott effectuated by exerting pressure against an interstate carrier is illegal under Section Ten of the Interstate Commerce Act.[20] This section, however, specifically subjects to its provisions employees of a carrier;[21] and there is no analogous provision in the Shipping Act. The interstate commerce cases are not, therefore, necessarily controlling.[22] The problem thus remains to be settled under the common law: does a laborer in accepting employment with a common carrier subject himself to the public obligations of the carrier? The *Reardon* and *Guillan* cases hold that he does not; the *Stewart* case argues in a strong *dictum* that he does.

When we speak of a common carrier, we generally mean the *entrepreneur,* the corporation engaged in the business of carriage.—in short, the owner. It is with him that the public contracts; it is he who bears the losses or gains. And it is the theory of our economic structure that in fulfilling his obligations, the owner has a free market from which to contract for his labor. A workingman who contracts to furnish labor to a carrier can no more be said to be engaged in the public service than the person who contracts to furnish the carrier with coal or power. At least until the employee becomes in a strict economic sense a co-owner of a public service enterprise, he cannot fairly be said to be subject to its burdens.[23]

Yet apart from the unsound *dictum* in the *Stewart* case, there is another aspect to the problem. It is ordinarily illegal for one to persuade, much less co-erce, another into breaking his contract with a third party,[24] or committing a tort. And for the carrier to fail to serve a shipper is ordinarily a tort.[25] Yet in the present situation the carrier is excused: there is a clear case of impossibility of performance.

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[19]*Cf.* United States *v.* Debs (1894) 64 Fed. 724, 764; United States *v.* Cassidy (1895) 67 Fed. 698, 781; Toledo, *etc.* Ry. *v.* Pennsylvania Co., *supra,* footnote 6, at p. 743.

[20]See, *supra,* footnote 19.

[21](1885) 24 Stat. 379, § 10, U. S. Comp. Stat. (1916) § 8574: "Any common carrier subject to the provisions of this act, or when such common carrier is a corporation, . . . any agent . . . or person . . . employed by such corporation shall wilfully omit . . . any act . . . required by this act to be done, . . . shall be guilty of a misdemeanor." The Clayton Act would to-day prevent injunctive relief in such a case. See *supra,* footnote 17.

[22]But in Chicago, *etc.* Ry. *v.* Burlington, *etc.* Ry. (C. C. A. 1888) 34 Fed. 481, an injunction was issued against a carrier which would not receive freight of a connecting carrier because of a threatened strike of its employees, without any reference to Section 10. The clause relied upon by the court was the general one against unreasonable discrimination.

[23]But *cf.* Taft, J., in Toledo, *etc.* Ry. *v.* Pennsylvania Co., *supra,* at p. 742, "While doing the work of the company, the employee is the company . . . They [the employees] are fully identified with their employers in the discharge of its public function." Accord, Chicago, *etc.* R. R. *v.* Burlington, *etc.* Ry. (C. C. A. 1888) 34 Fed. 481.

[24]Lumley *v.* Gye (1853) 2 E. & B. 216; Posner Co. *v.* Jackson (1918) 223 N. Y. 325, 119 N. E. 573; Lamb *v.* Cheney & Son. (1920) 227 N. Y. 418, 125 N. E. 817.

[25]See Pittsburg, *etc.* Ry. *v.* Morton (1878) 61 Ind. 538, 578.

Where the carrier stands ready in good faith to serve, but is prevented by a strike or boycott of its employees, it has not unreasonably discriminated against the shipper; and in this direction, such is the limit of the carrier's duty.[26] Since, then, the carrier has committed no tort in failing to serve, the employees who forced it to that position cannot be said to have induced the commission of an illegal act. There is thus presented a set of legal relationships differing materially from the rights and duties determined in *Lumley* v. *Gye*,[27] which at first sight might seem to be controlling. In that case Gye's conduct left Lumley with an action against Miss Wagner for the breach of the absolute duty arising out of her contract. In the present cases, the employees' conduct, far from inducing to a breach of duty, served to bring about a situation which defeated the carrier's conditional duty.

The *Reardon* and *Guillan* cases, however, were not decided on any such legalistic analysis. It is clear that, apart from specific legislation, the employees of a common carrier are privileged to strike without liability to the shipper for causing the non-fulfillment of the carrier's obligation. The *Bossert* case extended a similar privilege to the secondary boycott. These privileges are a recognition of the desirability of preserving to the worker his right to quit work and of persuading others to quit work, even at the cost of economic injury to others. The only definite limitation on the privilege of persuasion has been that its exercise must not lead to a breach of contract: this is the thesis of *Lumley* v. *Gye*. Shall the objects sanctioned by *Bossert* v. *Dhuy* be frustrated by any resultant injury short of that forbidden by *Lumley* v. *Gye*? It is to this question that the *Stewart* and *Guillan* cases give opposite answers.

It is the clash of conflicting policies, more than the clash of legal principle, which should be decisive of the present problem. In a society based upon free competition, it is inevitable that one group in safeguarding itself will step upon another's economic toes. This is part of the waste of competition. The privilege of injuring another in his trade can be sanctioned only so long as its exercise contributes to the ends which competition is supposed to subserve. *Bossert* v. *Dhuy* has indicated the limit of the privilege: that there be a unity of trade interests. *Reardon, Inc.* v. *Caton* and *Buyer* v. *Guillan* seem safely within that limit.

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[26]Murphy Hardware Co. *v.* Southern Ry. (1909) 150 N. C. 703, 64 S. E. 873. But compare People *v.* New York Cent., *etc.* R. R. (1883) 28 Hun 543, 557; Blackstock *v.* New York & Erie R. R. (1859) 20 N. Y. 48, holding that a peaceful strike of the carrier's employees is no defense to a claim for delay, with Greismer *v.* Lake Shore & M. S. Ry. (1886) 102 N. Y. 563, 7 N. E. 828, which held that a strike with violence is a defense to such a claim. This distinction is plainly artificial. Richland S. S. Co. *v.* Buffalo Drydock Co. (C. C. A. 1918) 254 Fed. 668. In the Guillan case Hand, J., said on this point, "I doubt very much whether it can be regarded as unfair, unjust or unreasonable to fail to carry forward the goods of a particular shipper if the carrier in good faith attempts to do this and finds that further pursuit of the matter will involve the loss of the only available employees and will be likely to paralyze all transportation by water between such important ports as Norfolk and New York . . . If the complainant has a remedy at law for damages he can avail himself of it and ought not to be allowed an injunction because he prefers a non-union carrier at so great an apparent expense to public commerce."

[27](1853) 2 E. & B. 216.